

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WISCONSIN**

---

**KEVIN CASEY,**

**Petitioner,**

**v.**

**Case No. 00-C-1095**

**MATTHEW FRANK,**

**Respondent.**

---

**DECISION AND ORDER**

Petitioner Kevin Casey moves for reconsideration of my previous Order denying his motion to modify the judgment under Fed. R. Civ. P. 60(b), or, in the alternative, brings a new motion for relief under Rule 60(b). He argues that the evidence against him is so weak that the decision to re-try him constitutes an abuse of prosecutorial discretion so severe as to violate his constitutional rights.

Because the motion presents a new ground for habeas relief not presented in the original petition, it must be dismissed as a second or successive petition. See Gonzalez v. Crosby, 125 S. Ct. 2641, 2647 (2005). In his petition, petitioner alleged that (1) his attorneys rendered ineffective assistance of counsel; (2) his Confrontation Clause rights were violated; (3) he was denied due process when certain evidence was excluded at trial; and (4) the cumulative effect of the trial court's errors resulted in a fundamental miscarriage of justice. He did not argue that the evidence was insufficient to convict him or that any decision to re-try him would constitute a violation of his constitutional rights. Thus, his current argument constitutes a new claim for relief, which I cannot entertain. See Dunlap v. Litscher, 301 F.3d 873, 875-76 (7th Cir. 2002).

In the alternative, even if I had jurisdiction, I would deny the motion. As noted in my previous Order denying petitioner's attempt to block a re-trial, the customary remedy when a court finds ineffective assistance of counsel is to order a new trial with competent counsel. My decision conditionally granting the writ permitted the State of Wisconsin to re-try petitioner, and it has decided to do so.<sup>1</sup> Petitioner's arguments as to the strength of the evidence and the credibility of the witnesses are appropriately directed to the jury in his re-trial.

**THEREFORE, IT IS ORDERED** that petitioner's motion for reconsideration and/or to modify the judgement (Docket # 90) is **DISMISSED**. Alternatively, the motion is **DENIED**.

Dated at Milwaukee, Wisconsin this 3rd day of August, 2005.

/s Lynn Adelman

---

LYNN ADELMAN  
District Judge

---

<sup>1</sup>The record shows that this decision was made before petitioner moved to block a re-trial and for unconditional release.